

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2013AP2411
2014AP737**

**Cir. Ct. Nos. 2012CV3949
2008CV3509**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

APPEAL NO. 2013AP2411

MARILYNN G. WEEDEN,

PLAINTIFF-APPELLANT,

V.

BANK OF AMERICA, N.A.,

DEFENDANT-RESPONDENT.

APPEAL NO. 2014AP737

COUNTRYWIDE HOME LOANS, INC.,

PLAINTIFF-RESPONDENT,

V.

MARILYNN G. WEEDEN,

DEFENDANT-APPELLANT,
UNKNOWN SPOUSE OF MARILYNN WEEDEN AND
CITIBANK FEDERAL SAVINGS BANK,
DEFENDANTS.

APPEALS from orders of the circuit court for Dane County:
FRANK D. REMINGTON and SHELLEY J. GAYLORD, Judges. *Affirmed.*

Before Blanchard, P.J., Lundsten, and Sherman, JJ.

¶1 PER CURIAM. Marilynn Weeden appeals an order dismissing Weeden’s action against Bank of America, N.A. (the Bank), which had claimed that the Bank failed to properly act on Weeden’s mortgage modification request.¹ Weeden also appeals an order denying Weeden’s motion to reopen the Bank’s foreclosure action against Weeden so that Weeden could pursue her claims against the Bank as counterclaims in the foreclosure case.² We conclude that the circuit court properly dismissed Weeden’s action against the Bank. We also conclude that the circuit court properly denied Weeden’s motion to reopen the foreclosure case. We affirm.

¹ The Honorable Frank D. Remington entered the order dismissing Weeden’s action against the Bank.

² The Honorable Shelley J. Gaylord entered the order denying Weeden’s motion to reopen the foreclosure case.

¶2 The Bank initiated foreclosure proceedings against Weeden in August 2008. Weeden failed to answer the complaint, and the circuit court entered a default judgment of foreclosure in November 2008.

¶3 In April 2012, Weeden moved to reopen the foreclosure. Weeden filed a proposed answer and counterclaims, alleging that the Bank failed to properly process Weeden's application for a loan modification under the Home Affordability Modification Program (the modification program) following the judgment of foreclosure. In September 2012, the circuit court denied the motion to reopen. The court found that Weeden had not explained her delay in moving to reopen the case years after the foreclosure judgment and on the day of the scheduled confirmation of sale. *See* WIS. STAT. § 806.07(2) (2013-14) (a motion to reopen must be made within a reasonable time).³ The court also explained that there is no private right of action under the modification program, *see Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012), and that Weeden had failed to demonstrate that she did, in fact, qualify for a loan modification. The court entered a confirmation of sale on October 9, 2012.

¶4 One week before the confirmation of sale, on October 2, 2012, Weeden filed a separate action against the Bank. Weeden asserted the same claims she attempted to raise in her proposed counterclaims in the foreclosure court, asserting damages based on the Bank's alleged failure to properly act on Weeden's loan modification request following the foreclosure judgment. The Bank moved to dismiss, contending that Weeden's claims were barred by the

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

doctrine of claim preclusion following the foreclosure. The circuit court granted the motion, concluding that Weeden's claims were compulsory counterclaims that had to be raised in the foreclosure action.

¶5 In February 2014, Weeden again moved to reopen the foreclosure case, arguing that the foreclosure court was the only forum for her to litigate those claims following the order dismissing her separate action against the Bank. The circuit court denied relief, finding that Weeden's claims were untimely and lacked merit. Weeden appeals the order dismissing Weeden's action against the Bank, and the subsequent order denying Weeden's second motion to reopen the foreclosure.

Weeden's Action Against the Bank

¶6 Weeden concedes that her claims against the bank were compulsory counterclaims that were required to be raised in the foreclosure action prior to the confirmation of sale. See *Moser v. Anchor Bank FSB*, No. 2012AP2700, unpublished slip op. (WI App June 20, 2013)⁴ (explaining that claim preclusion and the common-law compulsory counterclaim rule apply to claims against a bank in a separate action after a foreclosure action, because those claims could have been asserted in the foreclosure action prior to the confirmation of sale). Weeden argues that, nonetheless, her claims are not barred by claim preclusion because there has been no decision as to the merits of those claims. See *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995) (claim

⁴ See WIS. STAT. RULE 809.23(3)(b) ("an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under [WIS. STAT.] § 752.31(2) may be cited for its persuasive value").

preclusion requires “(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction”). We are not persuaded.

¶7 Weeden’s sole argument against claim preclusion—that there was not a final judgment on the merits as to the counterclaims in the foreclosure action—misses the mark. The basis for claim preclusion in this context is the compulsory counterclaim rule, which applies to bar a second action when a party fails to assert a counterclaim in the first action. *See Menard, Inc. v. Liteway Lighting Prods.*, 2005 WI 98, ¶¶27-28, 282 Wis. 2d 582, 698 N.W.2d 738 (explaining that “[c]laim preclusion ... may operate to preclude a plaintiff from asserting claims in a subsequent action that the party failed to assert in a previous action in which it was a defendant”; and that “[t]he common-law compulsory counterclaim rule ... bars a subsequent action by a party who was a defendant in a previous suit if ‘a favorable judgment in the second action would nullify the judgment in the original action or impair rights established in the initial action’” (quoted source omitted)). Because Weeden has not developed any argument that the compulsory counterclaim rule does not apply to preclude her action against the Bank, we affirm the order dismissing that action.⁵

⁵ Weeden attempts to distinguish the reasoning in *Moser v. Anchor Bank FSB*, No. 2012AP2700, unpublished slip op. (WI App June 20, 2013), by arguing that Weeden, unlike Moser, did attempt to bring her counterclaims in the foreclosure action prior to confirmation of sale. However, if Weeden wished to challenge the circuit court’s order denying her first motion to reopen, she was required to appeal that decision. Because Weeden did not appeal the circuit court decision denying Weeden’s first motion to reopen and to file counterclaims, we do not consider this argument further.

Weeden's Motion to Reopen the Foreclosure

¶8 Weeden contends that the foreclosure court erroneously exercised its discretion by denying Weeden's second motion to reopen the foreclosure action. *See Nelson v. Taff*, 175 Wis. 2d 178, 187, 499 N.W.2d 685 (Ct. App. 1993) (we review an order denying relief under WIS. STAT. § 806.07 for an erroneous exercise of discretion). Specifically, Weeden asserts that the circuit court failed to follow the law requiring Weeden's counterclaims to be raised in the foreclosure action, and failed to set forth a process of logical reasoning in denying Weeden's motion to reopen. *See Button v. Button*, 131 Wis. 2d 84, 99, 388 N.W.2d 546 (1986) (we uphold discretionary decisions "if the circuit court considered the relevant law and facts and set forth a process of logical reasoning").

¶9 The Bank responds that the circuit court properly exercised its discretion by denying Weeden's motion to reopen, contending that the circuit court properly applied the facts to the law, using a process of logical reasoning. The Bank points out that the circuit court considered the length of time between the foreclosure and Weeden's motion to reopen and the lack of merit to the counterclaims. *See M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 552-53, 555, 363 N.W.2d 419 (1985) (among other factors, circuit court to consider the merit of the claim the moving party wishes to pursue in seeking relief from a judgment or order under WIS. STAT. § 806.07(1)(h)); § 806.07(2) (motions for relief under § 806.07 must be made within a reasonable time).

¶10 Weeden replies that other factors that circuit courts must consider in deciding whether to grant relief under WIS. STAT. § 806.07(1)(h) weigh in favor of reopening the foreclosure. Weeden argues that she has continuously challenged the foreclosure proceedings, and thus the foreclosure judgment was not the result

of her deliberate choice; that there has been no judicial consideration of the merits of her counterclaims; and that the unusual procedure of having those claims dismissed in the separate action weighs in favor of reopening the foreclosure to allow Weeden to pursue her counterclaims.⁶ *See M.L.B.*, 122 Wis. 2d at 552-53. Again, we are not persuaded.

¶11 A court may grant relief from a judgment or order under WIS. STAT. § 806.07(1)(h) if extraordinary circumstances justify such relief. The burden is on the party seeking relief to establish that extraordinary circumstances exist. *See Martin v. Griffin*, 117 Wis. 2d 438, 443, 344 N.W.2d 206 (Ct. App. 1984). Here, Weeden has not shown that she is entitled to the relief she seeks. Weeden's argument is essentially that she is entitled to pursue her counterclaims in the foreclosure case because she was unable to pursue them in a separate action. However, the foreclosure court explained that it denied the motion to reopen because the proposed counterclaims lacked merit and the motion was not made within a reasonable time. The court's decision was a proper exercise of its discretion, and Weeden has not shown any basis for us to disturb that decision.

Fairness

¶12 Finally, Weeden argues that this court must reverse one of the two circuit court decisions and allow Weeden to litigate her claims on the merits. She

⁶ Weeden also argues, in conclusory fashion, that there are no intervening circumstances that would make it inequitable to grant relief, and that her counterclaims have merit. *See M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 552-53, 363 N.W.2d 419 (1985). Weeden does not explain, however, why it would not be inequitable to grant relief from the foreclosure following the confirmation of sale, nor does she explain why she believes her counterclaims have merit. While Weeden asserts that the court found that Weeden's separate action against the Bank stated a claim for relief, she does not provide any record citation for this assertion.

contends that it is illogical and unfair to hold that Weeden cannot bring her counterclaims in the foreclosure case, but that she is also precluded from bringing those claims in a subsequent action. We are not persuaded. As set forth above, Weeden's claims against the Bank were compulsory counterclaims in the foreclosure action, and thus the final order confirming the sale following foreclosure precluded Weeden from raising those claims in a later lawsuit. Additionally, the foreclosure court properly exercised its discretion by denying the motion to reopen based on its findings that Weeden had not shown that her claims had merit and that the motion was untimely. While the result may be that Weeden has not fully litigated her claims on the merits, that result does not compel us to reverse either of the legally sound orders that are the subject of these consolidated appeals.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

